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Guide  
to  
the  
Conflict  
of  
Interest  
Law

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Massachusetts State Ethics Commission



**ANNOTATED  
VERSION**

GUIDE TO THE  
CONFLICT OF INTEREST LAW  
CHAPTER 268A

Published By

THE MASSACHUSETTS STATE ETHICS COMMISSION

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## EXPLANATORY NOTE TO THE ANNOTATED GUIDE

The Annotated Version of the Guide to the Conflict of Interest Law has been prepared to help readers quickly associate the interpretations of Chapter 268A contained within the Guide with the various legal authorities that have announced, supported or contested those interpretations. It is not an exhaustive listing of such authorities, but, it is an attempt to create a source which facilitates legal research and promotes understanding of the application and effect of the Conflict of Interest Law.

The numbers appearing on the textual pages correspond to the notes on the facing page. Sources cited include federal cases, state cases, Ethics Commission adjudicatory decisions and other dispositions, advisory opinions of the Ethics Commission and Attorneys General, legislative documents and law review articles. Any Ethics Commission documents cited are available to the public at the Commission office.

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## PREFACE

The conflict-of-interest law, General Laws Chapter 268A, was enacted in 1962; from that time until 1978, the responsibility for its enforcement and interpretation rested with the Attorney General. In 1978, the Legislature created the State Ethics Commission to administer Chapter 268A and a new financial disclosure law (Chapter 268B). The Commission now serves as the primary agency charged with civil enforcement of the conflict statute, and it has assumed from the Attorney General the responsibility for advising public employees regarding their duties under that law.

The Commission has prepared this Guide to provide a general introduction and explanation of Chapter 268A. The Guide is intended to assist public officials and employees to understand the scope of, and reasons for, the law so that they may conform their conduct to it.

In its approach and discussion, this Guide is necessarily general. Illustrative examples are provided to clarify certain provisions of the conflict law, but the Guide does not -- and could not hope to -- deal with every question that public employees may raise about the conflict statute and its application to them. This Guide is not meant to serve as formal advice. Public employees should not presume that after reading it they can resolve on their own all conflict-of-interest problems they may have. With respect to any particular situation, an individual subject to Chapter 268A may request an advisory opinion regarding his or her responsibilities under the law in any specific situation. State and county employees should request such an opinion from the State Ethics Commission; municipal employees should direct their requests to their Corporation Counsel, Town Counsel or City Solicitor. (See Appendix A for further information regarding how to obtain an advisory opinion.)

A WORD OF CAUTION. THIS GUIDE REVIEWS CHAPTER 268A AS IN EFFECT ON DECEMBER 1, 1980. PUBLIC EMPLOYEES SHOULD WATCH FOR ANY AMENDMENTS TO THAT LAW THAT MAY AFFECT THEM. THE STATE ETHICS COMMISSION PERIODICALLY PUBLISHES A BULLETIN WHICH WILL REPORT SUCH CHANGES..

INTRODUCTION TO THE CONFLICT OF INTEREST LAW

1. UNITED STATES V. MISSISSIPPI VALLEY GENERATING COMPANY,  
364 U.S. 520, 550, 81 S. Ct. 294, 309 (1961).
2. G.L. c. 268A, §1(c) ("county employee"); §1(g)  
("municipal employee"); §1(q) ("state employee").
3. EC-COI-81-183 (the definition of "state employee"  
includes consultants).
4. EC-COI-79-109; but see EC-COI-79-12 (informal,  
temporary and general services will not implicate state  
employee status); 80-49 (members of informal advisory  
group formed to solicit non-government views are not  
state employees).
5. G.L. c. 268A, §1(o).
6. EC-COI-81-22 (Dept. of Mental Health Area Board); 79-109  
(see n. 3 above).

## INTRODUCTION TO THE CONFLICT LAW

### PURPOSE

Elected and appointed public employees are entrusted with the safety, welfare and well-being of the Commonwealth and its citizens. In return for this public trust, the citizens are entitled to expect that public employees' private interests will not conflict with their public obligations. Accordingly, the conflict-of-interest law prohibits public employees from engaging in conduct which might be contrary to the best interests of the general public. To accomplish this, the law is broadly written to prevent conduct which gives rise to even the potential or appearance of conflict. In Massachusetts, as in 40 other states and the federal government, conflict laws are not only concerned with dishonesty and corruption, but also attempt, as the United States Supreme Court has noted, "to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into . . . relationships which are fraught with temptation."<sup>1</sup>

### COVERAGE

Chapter 268A governs the conduct of public officials and employees (referred to collectively in the law as "employees") at the state, county and municipal levels of government. The term "employee" at each level is defined very expansively.<sup>2</sup> You are considered an employee of a particular level of government if you perform services for it or hold any office, position, employment or membership in any of its agencies. It does not matter whether you are paid or unpaid or whether you work full-time or part-time. People who work on an intermittent basis or as consultants will also be covered.<sup>3</sup> For example, private citizens serving on a special task force appointed by the Governor or the legislature to investigate and report on a specific issue are state employees.<sup>4</sup>

However, certain provisions of the law distinguish between regular, full-time employees and special employees.<sup>5</sup> That distinction is important since those provisions apply in a less restrictive fashion to special employees.<sup>6</sup> You are a "special state employee" if

- 1) you are not paid; or
- 2) you are not an elected official and

7. EC-COI-81-20 (part-time consultant); also, teacher at certain state schools: EC-COI-81-64 (based on terms of employment contract); 81-146 (based on school policy and contract); but see EC-COI-81-94 (outside employment during normal working hours precluded by terms of contract).
8. G.L. c. 268A, §1(p).
9. A.G. Conflict Op. 818A (Massport); A.G. Conflict Op. 823 (M.B.T.A.); A.G. Conflict Op. 834 (MDC).
10. G.L. c. 268A, §1(n).

- a. are specifically permitted to have private employment during normal working hours,<sup>7</sup>  
or
- b. did not earn compensation for more than 800 hours during the preceding 365 days.\*

In other words, if you are not expected to work a full work week (for example, some lawyers, Board members, etc.) or if you worked for the state for only a short time during the year (for example, as a consultant), you may qualify for special state employee status.

The governmental entities or agencies covered by Chapter 268A are also broadly defined.<sup>8</sup> For the purposes of the statute, all departments, councils, commissions, and boards in the executive, legislative and judicial branches of state government will be considered "state agencies." Also included is every division, bureau, institution, court, or other instrumentality within such a department. In addition, every state educational institution and every independent state authority, district or commission, such as Massport, the Massachusetts Turnpike Authority, the MBTA and the MDC are state agencies.<sup>9</sup> The definition of "county agency" and "municipal agency" are substantially the same.

In general, any entity performing governmental services at the state, county or municipal level is an agency for purposes of Chapter 268A.

#### STRUCTURE

The conflict-of-interest law has 30 sections. However, a great deal of duplication exists because many of the prohibitions are repeated for each level of government (state, county and municipal). After a section (Section 1) containing definitions, the statute breaks down as indicated in the following chart.

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\* "Special municipal employees" must be expressly classified as such by their city council, board of alderman or board of selectmen.<sup>10</sup>

11. G.L. c. 268B, §§3(i) & 4.
12. G.L. C. 268B, §4(d)(3).
13. G.L. c. 268A, §9.
14. Id.

SECTION APPLICABLE TO STATE EMPLOYEES	CORRESPONDING SECTION FOR EMPLOYEES OF COUNTY MUNICIPALITY		CRIMINAL PENALTY FINE/IMPRISONMENT	CIVIL PENALTY
\$2 (Bribery)	same	same	\$5,000/3 years	\$1,000
\$3 (Gifts)	same	same	\$3,000/2 years	\$1,000
\$4 (Other Compensation)	\$11	\$17	\$3,000/2 years	\$1,000
\$5 (Former Employees)	\$12	\$18	\$3,000/2 years	\$1,000
\$6 (Financial Interest)	\$13	\$19	\$3,000/2 years	\$1,000
\$7 (Contracts)	\$14	\$20	\$3,000/2 years	\$1,000
\$8A (Appointments by Boards)	\$15A	\$21A	-----	\$1,000
\$9 (Civil Remedies)	\$15	\$21	-----	---
\$10 (Advisory Opinions)	same	\$22	-----	---
\$23 (Standards of Conduct)	same	same	-----	\$1,000

Completing the statute are sections dealing with the purchase of insurance for public building projects (Section 8), specific restrictions on the future employment of trustees of public institutions of higher education (Section 23A), undated resignations (Section 21B), and suspension of persons under indictment (Section 25).

Throughout this Guide, the provisions of the statute which apply to state employees are discussed. However, the corresponding provisions of the statute at the other levels are so similar that, IN GENERAL, SIMPLY SUBSTITUTING THE WORD "COUNTY" OR "MUNICIPAL" IN PLACE OF "STATE" WILL ALERT YOU TO THE PARALLEL PROVISIONS OF THE STATUTE WHICH APPLY TO COUNTY AND MUNICIPAL EMPLOYEES.

#### ENFORCEMENT

The State Ethics Commission is the primary civil enforcement agency for violations of the conflict-of-interest law.<sup>11</sup> The Commission is authorized to investigate and adjudicate alleged violations by state, county or municipal employees. Upon finding that a violation has occurred, the Commission may impose civil penalties including fines of up to \$1,000 per violation.<sup>12</sup> In addition, the Commission may bring a civil action against any person who has acted to his economic advantage in violation of the law, and may recover on behalf of the Commonwealth damages in the amount of the economic advantage or \$500, whichever is greater.<sup>13</sup> In certain circumstances, the Commission may also recover multiple damages. Further, any violation which has substantially influenced an action taken by a state, county or municipal agency is grounds to avoid, rescind or cancel that action.<sup>14</sup>

In addition, the prohibitions of the law, with the exception of the Standards of Conduct set out in Section 23, all carry criminal penalties including fines and terms of imprisonment (see chart above). Criminal prosecutions under the law remain the responsibility of the Attorney General and District Attorneys throughout the Commonwealth.

A. BRIBES, GIFTS, OFFERS, AND PROMISES TO PUBLIC EMPLOYEES  
(Sections 2 and 3)

1. COMMONWEALTH V. DUTNEY, 4 Mass. App. 363, 348 N.E.2d 812 (1976) (selectmen soliciting bribe for liquor license approval).
  2. COMMONWEALTH V. KASTE, 4 Mass. App. 589, 355 N.E.2d 488 (1976) (defendant convicted of offering bribe to local public health official).

## MAJOR PROVISIONS OF THE LAW

### A. BRIBES, GIFTS, OFFERS, AND PROMISES TO PUBLIC EMPLOYEES (Sections 2 and 3)

#### 1. Bribes, Gifts, Offers and Promises to Influence Official Acts (Section 2)

Section 2 of Chapter 268A prohibits all state, county, and municipal employees from corruptly seeking or receiving bribes, gifts, promises, or anything else of value in return for being influenced in the performance of official acts.\* More specifically, Section 2 provides that public employees may not solicit or accept anything of value in return for:<sup>1</sup>

- a) Being influenced in performing any act within their official duties;
- b) Being influenced to commit, allow, or make the opportunity for the commission of any fraud on the Commonwealth or on a state, county or municipal agency;
- c) Being induced to act or refrain from acting in violation of their official duties; or
- d) Being influenced in giving testimony under oath or rendering themselves unavailable to testify. (However, the receipt of witness fees and associated lawful expenses by public employees is exempt from this statute.)

Central to a Section 2 violation is a finding that the public employee acted with a "corrupt intent" in soliciting or accepting the gift or other thing of value. As a general rule, when a public employee and a private party agree that certain official action (or inaction) by the public employee will follow from or result in the receipt of something of value from the private party, that agreement is sufficient evidence that the public employee is acting with corrupt intent.

\* Section 2 imposes penalties both on the public employees soliciting or accepting the gifts, bribes, etc. and on the private parties offering or giving them.<sup>2</sup>

3. COMMONWEALTH V. CANON 373 Mass. 494, 368 N.E.2d 1181, cert. denied 435 U.S. 933, 98 S. Ct. 1510 (1977) (investment opportunity is something of value); 67 ALR3d 1251 (meals, lodging or travel as bribes).
4. COMMONWEALTH V. BORANS, 1979 Mass. Adv. Sh. 2349, 393 N.E.2d 911 (1979).
5. COMMONWEALTH V. BORANS, supra.
6. COMMONWEALTH V. DUTNEY, supra; UNITED STATES V. KENNER 354 F.2d 780, cert. denied 383 U.S. 958, 86 S. CT. 1223 (1965).
7. IN THE MATTER OF THE COLLECTOR-TREASURER'S OFFICE OF THE CITY OF BOSTON, Comm. Disposition Agreement, Feb. 27, 1981; see also, UNITED STATES V. STANDEFER, 452 F. Supp. 1178, 1183 (1978); UNITED STATES V. EVANS, 572 F.2d 455, 479-82 (1978); UNITED STATES V. FENSTER, 449 F. Supp. 435, 437-38 (1978) and cases cited therein re: 18 U.S.C.A. §201; also STATE V. PRYBIL, 211 NW2d 308, 312-13 (Iowa, 1973).
8. COMMONWEALTH V. FAMIGLETTI 4 Mass. App. 584, 354 N.E.2d 890 (1976); cf. EC-COI-81-9 (receipt of items of nominal value not prohibited).

Items held to be of "substantial value:

- unpaid faculty appointment EC-COI-81-136
- office sharing arrangement EC-COI-80-43
- reimbursement for expenses EC-COI-81-181
- discounts of more than \$50 or totalling more than \$100 annually IN THE MATTER OF GEORGE A. MICHAEL, Commission Adjudicatory Docket No. 137, Sept. 28, 1981.

See also, Final Report of the Special Commission on Code of Ethics, 1962 House Doc. No. 3650 at 11.

9. See, p. 4, n. 2.

The thing of value which is solicited or accepted need not be money (for example, trips or improvements to one's home are covered, as well).<sup>3</sup> Moreover, the thing of value need not be for the benefit of the public employee personally, but may be for the benefit of another person or entity.

Example: A public employee violates Section 2 by demanding a cash payment from a contractor before he will approve the award of a state contract to that person.<sup>4</sup>

Example: A purchasing agent for a city solicits and receives a \$3,000 cash "campaign contribution" for the Mayor from a contractor doing business with the city. If he knows that the payment is a form of illegal kickback made in return for the award of a municipal contract, rather than a legitimate campaign contribution, the agent has violated Section 2, even though the money is for someone else.<sup>5</sup>

## 2. Additional Compensation or Gratuities for Official Acts (Section 3)

Section 3 of Chapter 268A is very similar to Section 2 in that it also relates to the solicitation or receipt of items of value by state, county and municipal employees.\* However, Section 3 is much broader than Section 2, for it does not require a corrupt intent on the part of the public employee and thus covers conduct which may not necessarily be viewed as corrupt.<sup>6</sup>

Section 3 prohibits public employees from seeking or receiving any additional compensation, tips, gratuities, or anything else of "substantial value" over and above their regular government pay for doing their jobs. The receipt of such extra compensation or other item of value violates Section 3 even if given by a private party solely out of gratitude for a job well done or out of a desire to maintain a public employee's goodwill.<sup>7</sup>

As in the case of Section 2, the "anything of substantial value" solicited or received need not be money. Moreover, in 1976 the Supreme Judicial Court of Massachusetts held that \$50 in cash is "of substantial value" within the meaning of Section 3.<sup>8</sup> Section 3 does not cover payments made "as provided by law for the proper discharge of official duties" or witness fees and related expenses.

\* Like Section 2, this section similarly penalizes the private parties offering or giving the items of value, as well as the public employees seeking or accepting them.<sup>9</sup>

10. See e.g., IN THE MATTER OF GEORGE A. MICHAEL, supra (sales discounts granted for or because of acts by high agency official).

#### B. RESTRICTION ON OUTSIDE ACTIVITY (Section 4)

1. IN THE MATTER OF WILLIAM L. BAGNI, SR., Commission Adjudicatory Docket No. 124, Jan. 29, 1981 (inspector compensated by private parties within his authority for preparing and filing forms required by state).
2. EC-COI-80-95 (Dept. of Education employee aiding private company in effort to get local cable TV license); 81-104 (Mass. Rehabilitation Commission employee being compensated in relation to matters under the authority of the Division of Employment Security); see also, COMMONWEALTH V. CANON, supra, (interest need not be financial).

Example: A complaint is filed with the Alcoholic Beverages Control Commission regarding a restaurant. An investigator for the ABCC investigates the complaint and determines that no action should be taken on it. Grateful for this resolution of the matter, the restaurant owner invites the investigator and his family to a free dinner at his restaurant. If the investigator accepts the invitation, he violates Section 3.<sup>10</sup> If the same investigator had solicited the free dinner from the restaurant owner prior to making a determination as to the merits of the complaint and in return for inaction on it, he would violate Section 2.

Example: A tax examiner in the Department of Revenue who is assigned to provide taxpayer assistance during the filing season would violate Section 3 if he asked for or accepted private fees or payments from the taxpayers he was assigned to assist.

B. RESTRICTION ON OUTSIDE ACTIVITY (Section 4)

1. General Application

Section 4 limits the activity a state employee may engage in for someone other than the Commonwealth or a state agency, in other words, what he may do "on the side." The section reflects the maxim that a person cannot serve two masters. Whenever an employee works for private interests in matters in which the state also has an interest, there is a potential for divided loyalties, influence peddling, the use of insider information and favoritism -- all at the expense of the state. To avoid such problems, Section 4 is broadly written to prohibit any state employee, except in the proper discharge of official duties, from receiving or requesting compensation from, or acting as agent or attorney for, anyone other than the Commonwealth or a state agency in relation to any "particular matter" in which the state is a party or has a "direct and substantial interest."<sup>11</sup>

With respect to this section, you should note at the outset the following:

- o The prohibition applies as long as some state agency has a direct and substantial interest in the matter; it does not matter whether your own agency has the interest.<sup>2</sup>

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\* Section 4 also prohibits anyone from giving, promising or offering such compensation to a state employee.

3. EC-COI-79-72 (private individual); 80-95 (private organization; 81-32 (county); 79-100 (federal); 80-82 (local, but see p. 11, State Employee Holding Local Office).
4. COMMONWEALTH V. CANON, supra.
5. EC-COI-81-142; but see EC-COI-79-110 ("compensation does not include mandatory, on-site residency of apartment complex employee").
6. G.L. c. 268A, §1(k).
7. EC-COI-81-11 (national educational issues are not particular matters); see also EC-COI-81-34 (regulations per se).
8. EC-COI-79-90 (grant renewal); 81-98 (contract renewal).
9. EC-COI-81-81 (Home Rule petition); BELIN V. SECRETARY OF THE COMMONWEALTH, 362 Mass. 530, 288 N.E.2d 287 (1973); COMMISSIONER OF PUBLIC HEALTH V. BESSIE M. BURKE MEM. HOSPITAL, 366 Mass. 734, 323 N.E.2d 309 (1975) (special legislation generally).
10. EC-COI-79-23 (state income tax returns); IN THE MATTER OF LOUIS L. LOGAN, Commission Adjudicatory Docket No. 131, Apr. 28, 1981 (corporate tax returns).
11. EC-COI-81-77 (license applications or appeals).
12. EC-COI-79-72; 79-116 (juvenile).

- o "Anyone other than the Commonwealth or a state agency" includes private individuals or organizations, as well as other levels of government (county, local or federal).<sup>3</sup>
- o Compensation includes not only money but also anything of value received for services rendered. For example, the opportunity to participate in an investment scheme qualifies as compensation as would various fringe benefits.<sup>4</sup> Reimbursements for expenses are not compensation.<sup>5</sup>

Not all outside activity is prohibited, but only outside activity which relates to particular matters of direct and substantial interest to the state. First, there must be a particular matter which is defined as "any judicial or other proceeding, application, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court."<sup>6</sup> This definition focuses on types of activity which involve making decisions and exercising judgment. It covers specific decisions, projects, proceedings, and the like, rather than general issues or subject areas.<sup>7</sup> For example, a grant award by the Department of Elder Affairs for a study of elder abuse is a particular matter. However, the general subject of elder abuse is not. And, if the DEA grant is renewed the year after its original award, that renewal grant is a new particular matter, distinct from the original grant.<sup>8</sup> While the enactment of general legislation is not included in the definition of particular matter, the term does cover enactment of special legislation.<sup>9</sup> Special laws are those directed at a specific situation or individual or entity -- for example, a law exempting a specifically identified hospital from certain regulations promulgated by the Department of Public Health. General laws, in contrast, usually establish a rule of future conduct applicable on a wider scale.

Second, the particular matter must be of direct and substantial interest to the state, such as:

- o All particular matters which bring the financial interest of the state into play -- for example, all contracts and grants to which the state is a party, and determinations of state tax liability;<sup>10</sup>
- o Any regulatory or adjudicatory proceeding or decision pending in any state agency;<sup>11</sup>
- o Criminal proceedings;<sup>12</sup>

13. EC-COI-80-48 (court action in which state is a party).
14. Specific matters of "direct and substantial interest" to the state:
  - nursing home bankruptcy proceedings  
EC-COI-79-100
  - client referrals from state agencies  
to private providers EC-COI-79-5; 81-129
  - issuance and renewal of day care center  
licenses EC-COI-80-53
  - Medicaid billing practices EC-COI-80-17.
15. Specific matters not of "direct and substantial interest" to the state:
  - public opinion research and analysis  
EC-COI-80-5
  - regulations (although a subsequent  
challenge to the validity of the  
regulations would be) EC-COI-81-34
  - municipal application for a certain  
federal grant EC-COI-81-44
  - teaching contract with a private in-  
stitution EC-COI-81-137.
16. Municipal matters of "direct and substantial interest" to the state:
  - assessing practices EC-COI-79-7
  - cable TV licensing EC-COI-80-95
  - election practices EC-COI-79-60
  - liquor licensing EC-COI-79-3
  - local food inspection EC-COI-80-75
  - responsibilities and activities of a  
municipal treasurer EC-COI-79-63
  - sewerage operation and regulation  
EC-COI-79-48.
17. Compare EC-COI-80-55 (Public Works employee may not work for private company in connection with MBTA contract).
18. EC-COI-81-158 (state employee on Board of Directors of a credit union cannot act as "agent" in regards to statutorily required audits).
19. EC-COI-80-53 (state employee may not represent a family day care home in license renewal proceeding); 79-80 (state employee who is President and Trustee of a private corporation may not act as "agent" for the corporation before state agency in an application for approval); see also, IN THE MATTER OF WILLIAM L. BAGNI, Sr., supra (state employee acting as "agent" for tow truck operators in filing of state-required tariff schedule).
20. See, e.g., IN THE MATTER OF C. JOSEPH DOYLE, Commission Adjudicatory Docket No. 109, June 18, 1980 (employee of the legislature acting as "agent" for non-profit corporation seeking state funds).

- o Civil litigation involving the Commonwealth or a state agency as a party (but not a lawsuit between two private parties where the Commonwealth is not involved even though that lawsuit is pending in a state court).<sup>13</sup>
- o Decisions about the use of state property and funds.<sup>14, 15</sup>
- o Certain municipal matters and activities if a state agency extensively regulates, supervises or is involved in the local matter -- for example, liquor licensing, assessing practices, election law practices, sewerage disposal, local enforcement of the public health laws, and cable television licensing.<sup>16</sup>

As stated above, your own agency need not be involved in the particular matter.

Example: An engineer who works full-time for the Department of Public Safety is paid by a private company to serve as a consultant in connection with a lawsuit between that company and the Department of Environmental Management (DEM), another state agency. Although the engineer does not work for DEM, Section 4 would prohibit her from performing such consulting services since the lawsuit at issue is a particular matter of direct and substantial interest to DEM and the Commonwealth.<sup>17</sup>.

Finally, you should note that when you act as agent or attorney for someone other than the state in connection with a particular matter of direct and substantial interest to the state, you violate Section 4 even if you are not paid for your services.<sup>18</sup> Neither "agent" nor "attorney" is defined in Chapter 268A. The term "attorney" is relatively clear; it basically applies to lawyers but may also include any person exercising a power of attorney. The term "agent" is much broader than attorney and refers to anybody acting in a representative capacity on behalf of someone else, regardless of whether the employee is a lawyer.<sup>19</sup>

Example: A state employee serves in his off-duty hours as a director of a non-profit corporation which runs an alcohol abuse program. When the employee undertakes to speak in favor of the corporation's grant application to the Department of Mental Health (DMH), he is acting as agent for the corporation in connection with a particular matter (the grant) of direct and substantial interest to DMH and the Commonwealth.<sup>20</sup>

21. EC-COI-80-57 (member of a state board may not prepare application for submission to his agency).
22. EC-COI-80-31.
23. G.L. c. 268A, §1(j).

Example: When the same state employee participates in the non-profit corporation's directors' meetings, he is not acting as the corporation's agent within the meaning of Chapter 268A; such participation does not constitute acting in a representative capacity on behalf of the corporation in relation to the state or a state agency.

## 2. Application to Special State Employees

As noted earlier in this Guide, the conflict-of-interest law imposes fewer restrictions on special state employees because special state employees have more limited contact with state government. Accordingly, Section 4 applies to special state employees only when there is a connection between the special state employee's outside activity and his or her work for the state.

A special state employee is prohibited from receiving compensation from, or acting as an agent or attorney for, someone other than the state only if the particular matter involved is one:

- a) in which he or she participated at any time as a state employee or special state employee;
- b) which is or has been within the preceding year the subject of the employee's official responsibility,<sup>21</sup> or
- c) which is pending in the state agency in which the employee is serving (if he or she serves more than 60 days in any 365 day period).<sup>22</sup>

If any one of these three conditions is met, then the prohibitions of Section 4 will apply to the special employee just as they do to the regular employee. A point should be made about each condition:

- o "Participate" means to participate "personally and substantially through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise."<sup>23</sup>
- o An employee will have "official responsibility" over a matter if he or she has "direct administrative or operating authority. . . to approve, disapprove or otherwise direct agency action." The

24. G.L. c. 268A, §1(i).
25. EC-COI-81-2 (all matters before a particular division of a state agency are within the "official responsibility" of the members of the state commission which supervises and controls the division).
26. EC-COI-81-140 (a special state employee in the Department of Public Health may not contract with a nursing home to provide services required by the home's licensee).
27. EC-COI-80-31.

authority need not be final; it may be exercised with others or through subordinates.<sup>24</sup> Many special state employees, including most consultants, have responsibility over only the specific project for which they were hired. On the other hand, members of boards or commissions are often special state employees but will normally have "official responsibility" for every matter which is pending in their agency.<sup>25</sup>

- o The prohibition with respect to matters pending in the special state employee's agency applies only if he or she serves in the agency more than 60 days in any 365 day period.<sup>26</sup> To serve more than 60 days means to perform work on more than 60 days. Moreover, work on any part of a day will be considered work for one full day. The employee is responsible for keeping accurate records in this regard.<sup>27</sup>

Example: A private computer programmer is hired as a part-time consultant by the Department of Public Welfare (DPW) to design a program for speedier payment of emergency fuel assistance benefits. During the period when she is consulting, a private company bidding on a computer contract with the Department of Public Health (DPH) asks the programmer to work on the contract bid. Because the programmer is hired by the state on a part-time basis, she is a "special state employee." Therefore, she is not prohibited from performing services for the private company bidding on the DPH contract, since that second contract is not a particular matter she participates in or has official responsibility for as a special state employee in DPW, and is not pending in DPW.

Example: A lawyer consults with the Department of Public Health (DPH) for 45 days spread out over a year. His work relates exclusively to the DPH lead-paint program. The lawyer could represent a hospital in a license removal procedure before DPH during that year, so long as his consulting work for that agency does not relate to hospital licensing, since he serves as a special state employee in DPH for less than 60 days during a year.

28. EC-COI-79-66 (member of the General Court may not be compensated for legal services requiring negotiations and personal appearance before a state agency).
  29. EC-COI-79-92 (member of the General Court may be compensated for filing for a certificate of convenience and necessity with a state agency on behalf of a client).
  30. EC-COI-81-155 (member of the General Court may represent a private party in a civil suit against a state agency).
- 
31. EC-COI-81-31 (a member of the General Court may represent a private client before the Appellate Tax Board).
  32. EC-COI-80-4; also EC-COI-79-68 (uncompensated legal services); 81-88 (G.L. c. 268A §23[d] applies, see p.26).

### 3. Application to Members of the General Court

Legislators are not subject to the provisions of Section 4 discussed above. However, they may not receive compensation other than their legislative salary for personally appearing before any state agency<sup>28</sup> unless:

- a) the particular matter on which they appear is "ministerial" (a term which includes the filing or amendment of tax returns, license or permit applications, incorporation papers or other documents); or<sup>29</sup>
- b) the appearance is before a court; or<sup>30</sup>
- c) the proceeding before the agency is a quasi-judicial proceeding. It will be a quasi-judicial proceeding if the action of the state agency is adjudicatory in nature, is appealable to the courts, and both sides are entitled to representation by counsel other than the Attorney General or counsel for the state agency conducting the proceeding. For example, a state representative can represent a private client before the Industrial Accident Board in an action against the company employing his client. However, he could not do so if his client's claim was against the Commonwealth which would be represented by the Department of the Attorney General.<sup>31</sup>

Since members of the state legislature are expected to speak and act on behalf of their constituents, uncompensated activity by a member of the General Court does not violate this particular section of the conflict law although other sections may be relevant.<sup>32</sup>

### 4. Exemptions

#### a. State Employees Holding Local Office

As noted above, Section 4 deals with a state employee receiving compensation from, or acting on behalf of, someone other than the Commonwealth. "Someone other than the Commonwealth" can mean another governmental body, as, for example, the Town of Hopkinton or City of Boston. However, a 1980 amendment to Section 4 permits a state employee to hold an elective or appointive office in a city, town or district and to be paid for doing so, but he or she may not

33. St. 1980, c. 10; EC-COI-80-107 (Department of Community Affairs employee may serve on a local housing authority); 81-78 (employee of a state agency may serve on a local board subject to the jurisdiction of the state agency by which they are employed as long as they refrain from acting or voting at the local level on matters within the purview of their agency).
34. EC-COI-81-77 (state employee); 81-33 (county employee).
35. BACHMAN V. PERTSCHUK, 437 F.Supp. 973 (1977) (administrative proceedings only).
36. EC-COI-80-16 (fiduciary); 80-67 (guardian).
37. EC-COI-81-180 (provision did not apply).

vote or act on any matter within the purview of the state agency where he or she works or over which he or she has official responsibility.<sup>33</sup>

Example: An employee of the Alcoholic Beverages Control Commission (ABCC) may serve on the Board of Selectmen of the town in which he lives. However, the employee may not vote or act as a selectman on the issuance of local liquor licenses since the issuance of liquor licenses is within the purview of the ABCC.

b. Other Exemptions

You will not violate Section 4 if you act in the proper discharge of your official state duties. For example, if a statute requires a state employee to represent interests other than the Commonwealth's, it would not violate Section 4 for the employee to do so. But such an occurrence will be rare.<sup>34</sup>

Also, Section 4 lists four particular actions which are exempt from the prohibitions of that section. These exempt or permissible actions include:

- a) providing unpaid assistance to someone who is subject to employment discipline or other personnel proceedings in relation to those proceedings;<sup>35</sup>
- b) acting as a paid or unpaid agent or attorney for members of the employee's immediate family or any person for whom the employee serves as a guardian, executor, administrator or other fiduciary, so long as the employee did not participate in, and does not have responsibility over, the matter involved and so long as the employee's appointing authority approves;<sup>36</sup>
- c) a present or former special state employee's assisting another person for compensation in working on a state contract, so long as the head of the special state employee's agency certifies in writing that "the interest of the Commonwealth requires such aid or assistance," and the certification has been filed with the State Ethics Commission;<sup>37</sup>
- d) giving testimony under oath or sworn statements.

C. FORMER STATE EMPLOYEE AND PARTNERS OF PRESENT AND  
FORMER STATE EMPLOYEES (Section 5)

1. EC-COI-81-114 (former MBTA employer may not work for MBTA contractor on matters in which he participated as a state employee); also, EC-COI-79-29 and 80-73 ("participate").

C. FORMER STATE EMPLOYEES AND PARTNERS OF PRESENT  
AND FORMER STATE EMPLOYEES (Section 5)

Section 5 of Chapter 268A extends to people in the private sector many of Section 4's prohibitions against assisting outsiders. This section covers state employees who have left state service and the partners of both present and former state employees; these prohibitions apply equally to special state employees and their partners. The purpose of Section 5 is to insure that former state employees do not use their past friendships and associations within government or use confidential information obtained while serving the government to derive unfair advantage for themselves or others. Section 5 is not designed to prohibit former state employees from utilizing the general expertise which they developed while a state employee, but instead is directed towards individual projects, decisions, or other "particular matters" in which they actually participated or over which they had official responsibility as state employees.

The provisions which apply to partners are designed to prevent the state employee from indirectly benefiting from matters which are or were within his official responsibility. They also prevent partners from deriving an unfair advantage as a result of their association with a present or former state employee.

1. Former State Employees

Section 5(a) prevents a former state employee from acting as agent or attorney for, or receiving compensation directly or indirectly from, anyone other than the Commonwealth or a state agency in connection with any particular matter in which the state is a party or has a direct and substantial interest and in which he or she participated as a state employee. Thus, if you actually participated in a particular matter as a state employee you can never become involved in that same particular matter after you leave state service except on behalf of the Commonwealth.<sup>1</sup>

Example: During 1976 an Assistant Attorney General represented the Department of Public Health in an appeal to the Superior Court by a hospital from a decision denying it a certificate of need for a new hospital wing. On January 1, 1977, he left state service and entered private practice. During 1978, the hospital sought to retain him to represent it

2. EC-COI-79-37; 81-28.
3. EC-COI-79-34. Other examples of the application of §5:
  - former state employee prohibited from private employment under license where he participated as a state employee in the license award EC-COI-81-8
  - former state employee prohibited from working for private corporation in connection with state grants which he awarded to the corporation while state employee EC-COI-81-6
  - former state employee who prepared RFP's and reviewed contract proposals cannot work on those contracts for private employer EC-COI-81-114
  - former state attorney may not represent private parties in a challenge to a state law where she participated in litigation involving the same statute, issues and parties EC-COI-81-28
  - former state attorney who participated in drafting regulations may represent clients in connection with those regulations but may not challenge the validity of those regulations EC-COI-81-34.
4. EC-COI-80-59 (former General Counsel to a state agency excluded from all matters pending in his legal department during two years prior to his leaving state employ).
5. EC-COI-80-59 (see n. 4 above).

in a later stage of the same case. Since the lawyer had participated in the case as an Assistant Attorney General, he would be precluded under Section 5(a) from representing the hospital at any stage of these proceedings.<sup>2</sup>

Example: In May of 1979, a Department of Education employee approved a grant to a town for an elementary school program for fiscal year 1980. On July 1, 1979, she resigned her state position and set up her own educational consulting practice. She may not work for the town on the fiscal year 1980 grant since she had participated in awarding it. However, each annual grant is a separate particular matter. Therefore, if the town in 1980 applies for and receives a similar grant for fiscal year 1981, she may work for the town on that grant.<sup>3</sup>

Section 5(b) turns on the authority formerly exercised by a state employee as opposed to his or her actual participation in a matter. It prohibits a former state employee for one year after leaving state service from personally appearing before any state agency or state court on behalf of someone other than the state in connection with a particular matter in which the state is a party or has a direct and substantial interest and which was within the employee's official responsibility as a state employee within the two-year period before he or she left state service. Note that this prohibition lasts for only one year, and restricts only appearances before state courts and agencies. However, it does not matter whether you are paid for your appearance or whether you have actually worked on the matter yourself as a state employee. It is sufficient that the matter was within your official responsibility. As a general proposition, the more supervisory the position you hold, the more extensive your official responsibility will be even though you may actually participate in fewer particular matters.<sup>4</sup>

Example: A member of the Appellate Tax Board has official responsibility over all appeals filed with the Board. After leaving the Board, the member may not appear for one year on behalf of a private party or a city or town government before the Appellate Tax Board on any case or proceeding which was pending before the Board at any time during the last two years of the former member's service. This prohibition exists even though the member personally took no action on the case. If he had taken some action, the permanent prohibition of Section 5(a) would apply.<sup>5</sup>

6. EC-COI-81-75 (a state employee's firm and his partners may not represent non-state interests before the state employee's state agency).
7. EC-COI-80-50.
8. EC-COI-81-45; 81-30 (associate in a law firm is not a partner for purposes of §5[c]).

Example: An employee of the Department of Revenue is assigned by his supervisor to audit a company's tax returns. Section 5(a) will prohibit the auditor from ever working for the company in relation to that audit. Although the supervisor does not personally work on the audit, Section 5(b) will prohibit her for one year after she leaves state service from appearing on behalf of the company before any court or state agency in relation to the audit.

## 2. Partners

Section 5(d) prohibits the partner of a current state employee from acting as agent or attorney for anyone other than the state in connection with a particular matter in which the state is a party or has a direct and substantial interest and in which the state employee has ever participated or over which he has official responsibility.<sup>6</sup>

Example: A member of the Civil Service Commission is a partner in a law firm. As a Commissioner he has official responsibility for all appeals filed with the Commission. His partners cannot represent anyone other than the state in any Commission proceeding. It will not matter that the Commissioner has taken no action on the appeal or disqualifies himself from that proceeding.<sup>7</sup>

Section 5(c) prohibits the partner of a former state employee for one year after the former state employee leaves state service from engaging in any activity in which the former state employee is prohibited from engaging by Section 5(a). In other words, if a former state employee can never do something, his partner will not be able to do it for one year.<sup>8</sup>

Example: When the Civil Service Commissioner's term expires, Section 5(a) will forever prohibit him from representing private clients in connection with appeals in which he had actually participated as a Commissioner. Section 5(c) will prohibit his partners for one year from providing such representation in civil service proceedings in which the former Commissioner had actually participated.

9. EC-COI-80-43 (members of a group who give the appearance of being partners by their conduct will be treated as such); but see, EC-COI-81-30 (associate in a law firm).
10. EC-COI-81-80 (employee of the legislature may not act as "legislative agent" before the General Court for one year after leaving state employment).

"Partner" is an important but undefined term in Chapter 268A. To advance the purposes of the law, the term is not restricted to those who enter into formal partnership agreements. Rather, partner means any person who joins with the state employee or former state employee formally or informally in a common business venture. The substance of the relationship is what counts, not the term the parties use to describe that relationship. In addition, if a group creates the public appearance of a partnership (for example, by using joint stationery, business cards, and business listings), they will be treated as partners even though they may not in fact share profits.<sup>9</sup>

Example: Three architects form a group called "Design Building Associates." They do not have a formal partnership agreement, but share common expenses and work together on some projects on which they divide the profits. The three architects will be treated as partners for purposes of Chapter 268A. Accordingly, if one of the architects is a former state employee, the other two will be prohibited by Section 5(c) for one year after the state employee partner left state service from working on any project or other matter in which the former state employee participated as a state employee.

### 3. Lobbying by Former State Employees

A former state employee, including a legislator or any other elected official, cannot serve as a lobbyist for anyone other than the Commonwealth or a state agency before the former employee's own state agency for one year after the employee leaves that agency. (This prohibition applies only to state employees who leave state service after February 1, 1979).<sup>10</sup>

Example: A member of the House of Representatives does not seek re-election for a second term in 1980, and, therefore, leaves the Legislature in the beginning of January, 1981. For a year thereafter, the former legislator is prohibited from serving as a lobbyist before the Legislature for any private or non-state interest.

11. See p. 12, n. 34.

D. RESTRICTIONS ON OFFICIAL ACTIONS (Section 6)

1. EC-COI-80-18 (financial interest of husband); IN THE MATTER OF JAMES J. CRAVEN, JR., Commission Adjudicatory Docket No. 110, June 18, 1980 (state legislator participated in matters in which his brothers and daughters had a financial interest).
2. EC-COI-79-84 (state employee may not participate in matters involving the financial interest of a business owned by a person with whom he is a partner in an unrelated venture).
3. EC-COI-79-64 (employee); 81-17 (director); 81-156 (officer).
4. EC-COI-81-45 (head of a state agency may not participate in matters involving financial interest of a law firm with whom he is negotiating concerning prospective employment).

4. Work Under Contracts with or for the Benefit of the State

A present or former special state employee may aid or assist another person for compensation in the performance of work under a contract with or for the benefit of the Commonwealth provided that the head of the special state employee's department or agency has certified in writing that the interest of the Commonwealth requires such aid or assistance and the certification has been filed with the State Ethics Commission.<sup>11</sup>

D. RESTRICTIONS ON OFFICIAL ACTIONS (Section 6)

Whereas Sections 4, 5 and 7 may limit your outside interests and activities, Section 6 restricts what you may do on your state job. It recognizes one of the most obvious principles of the conflict-of-interest law -- that public employees must not act in their official capacities in matters in which they have a personal financial stake. Section 6 also recognizes that a state employee's integrity can just as easily be compromised when he or she acts on matters affecting the financial interests of other individuals or businesses with whom he or she is closely related. Section 6 does not prevent state employees from having private financial interests, but if they do, their actions as state employees may be restricted. Accordingly, except in limited situations (explained below), a state employee (including a special state employee) may not participate in a particular matter in which the following people or entities have a financial interest:

- a) the employee, himself or herself;
- b) the employee's "immediate family" which is defined as the employee, the employee's spouse, and their parents, children, brothers and sisters;<sup>1</sup>
- c) the employee's partner;<sup>2</sup>
- d) a business organization in which the employee is serving as an officer, director, trustee, partner or employee; or<sup>3</sup>
- e) any person or organization with whom the employee is negotiating or has any arrangement concerning prospective employment.<sup>4</sup>

5. EC-COI-80-110 (legislator's interest in postponement of property tax re-evaluation in his locality is shared by "substantial segment of the public," i.e., others in the town); GRAHAM V. MCGRAIL, 370 Mass. 133, 345 N.E.2d 888 (1976) (financial interest of every town taxpayer in the town's school budget is not a "financial interest" for purposes of §19; the interest of a school employee in his own compensation is).
6. See generally, EC-COI-81-153 (financial interest of a city in actions of a state agency).
7. EC-COI-81-22 (state employee on state board prohibited from participating in board matters in which non-profit corporation employing him has a financial interest).
8. EC-COI-81-56 (state employee may serve as city councillor but must avoid matters as a state employee in which the city has a financial interest); A.G. Conflict Op. 613 (state employee may not participate as such in matters concerning funding of local youth program by which he is employed).

Moreover, it is not enough that you simply refrain from acting in a particular matter in which any of the people or entities listed above has a financial interest. If such a matter comes up and if you would ordinarily be required to participate in it, you must advise in writing the person who appointed you to your job and the State Ethics Commission of the matter and the financial interest involved. Your appointing official will then either a) assign the matter to another employee, b) assume responsibility for it, or c) make a written determination that the financial interest involved is not so substantial as to be likely to affect the integrity of your services. Only if such a determination is made (a copy of which must be sent to you and the State Ethics Commission), may you go ahead and participate in the matter.

Financial Interest means any economic interest (no matter how small) of a particular individual that is not shared with a large segment of the public.<sup>5</sup> For example, the fact that a state employee is a taxpayer gives him or her a financial interest in every governmental decision made that will affect the state sales, meals, or income tax rates. Yet the employee's financial interest as a taxpayer is one shared by the majority of citizens and therefore does not qualify as a financial interest within the meaning of the conflict law. On the other hand, a state employee clearly has a financial interest in the award of a state contract to a corporation in which he or she is a stockholder.<sup>6</sup>

Partner means a partner in any venture, even if totally unrelated to the matter in which the employee must act. For example, a meals tax auditor in the Department of Revenue is a partner of Mr. X in a real estate development venture in Worcester; the auditor cannot participate in the meals tax audit of Mr. X's restaurant located in Concord even though the auditor has no interest whatsoever in the restaurant.

Business organization includes not only business organizations such as sole proprietorships, corporations, partnerships, and trust, but also non-profit corporations,<sup>7</sup> associations and municipalities.<sup>8</sup>

Participate has been defined earlier in this Guide. For purposes of Section 6, it is important to remember that participate includes participation not only in a final decision but in any of the steps along the way as well. A state employee is not exempt from the provisions of Section 6 simply because he or she does not have the final decisionmaking responsibility over a particular matter. If the employee was involved in any substantial way in working on the matter

9. EC-COI-81-58; but see EC-COI-79-51 (preparation of RFP alone is not "personal and substantial" participation).
10. IN THE MATTER OF JAMES J. CRAVEN, JR., supra (legislator participated in funding decision of Executive Office of Communities and Development in which several of his immediate family members had a financial interest).
11. EC-COI-80-12 (state employee vote on award of grants in which his wife has a financial interest).
12. EC-COI-79-61; see also, EC-COI-80-20 (state employee must disclose unsolicited offers of employment made by private parties).

at any stage of consideration, he or she probably "participated" in it.<sup>9</sup> Furthermore, an employee can participate within the meaning of Chapter 268A even if his or her duties would not have required it. For example, if employees personally and substantially interject themselves into the making of a decision by their agency or by another agency (e.g., by recommending a course of action), they may well have participated in that decision even if they had no responsibility for participating in it.<sup>10</sup>

Example: Joe Jones, the supervisor of appraisers in the Department of Public Works (DPW), is responsible for approving all DPW appraisals of land to widen a Massachusetts roadway which runs through several towns and will take ten feet of land from every parcel fronting the road. Mr. Jones and his wife live on this road as do Mrs. Jones' sister, the Jones' daughter and her husband, and Mrs. Jones' parents. Mr. Jones must disclose these facts in writing to his appointing authority and the State Ethics Commission. Moreover, he may not approve, disapprove or otherwise participate in DPW's appraisal of any of these parcels unless his appointing official makes a written determination that the integrity of his services will not be affected.

Example: A state criminal justice advisory council reviews and makes recommendations to the Governor concerning the award of state and federal funds for criminal justice projects. A member of the council has a daughter who serves as Executive Director of a private agency applying for a grant of some criminal justice funds; the daughter's salary will be paid from those funds. Under Section 6, the council member, although a special state employee, is precluded from voting on or discussing the request for funding submitted by her daughter's agency, as well as any competing application for the same grant. In addition, she must comply with the disclosure requirements of Section 6.<sup>11</sup>

Example: An Area Advisory Board recommends to the head of a state agency who should be awarded state and federal funds. A member of the Area Board is a director of a private, non-profit corporation which has applied for such funding. The member, even though a special state employee, must disclose these facts in writing to her appointing authority and the State Ethics Commission. She may not vote on or discuss the application for funding by the corporation unless her appointing authority makes a written determination that the integrity of her services will not be affected.<sup>12</sup>

E. ADDITIONAL DISCLOSURE REQUIREMENTS FOR ELECTED  
OFFICIALS (Section 6A)

1. EC-COI-81-81 (legislator's law practice has financial interest in Home Rule bill).

F. FINANCIAL INTERESTS IN STATE CONTRACTS (Section 7)

1. Buss, "The Massachusetts Conflict of Interest Statute: An Analysis," 45 B.U. Law Rev. 299 (1965); see also, EC-COI-80-89 and WALSH V. LOVE, Norfolk Superior Court Civ. Act. No. 132687, July 2, 1981 (G.L. c. 268A, §20) (selectman may not be employed as teacher in the same town).

E. ADDITIONAL DISCLOSURE REQUIREMENTS FOR ELECTED  
OFFICIALS (Section 6A)

In addition to the prohibitions and disclosure requirements of Section 6, a public official who in the discharge of his official duties would be required knowingly to take an action which would substantially affect his or her own financial interests must file with the State Ethics Commission a written statement indicating the action he or she is required to take and the nature of the financial interest.

Section 6A applies only to individuals who hold public office, that is, positions for which one is nominated at a state primary or chosen at a state election (but not members of the United States Congress). Moreover, it does not apply if the financial effect of the action on the official is no greater than the effect on the general public. However, the obligation to make such a filing is not limited to instances where the officials are called upon to participate in "particular matters." For instance, if a piece of general legislation, which by definition is not a particular matter, would affect the financial interests of a company owned by a legislator, Section 6 would not require the legislator to refrain from acting, but Section 6A would require the legislator to disclose to the State Ethics Commission the financial interests of his company in the general legislation.<sup>1</sup>

F. FINANCIAL INTERESTS IN STATE CONTRACTS (Section 7)

1. General Prohibition

Section 7 of Chapter 268A prohibits a state employee from having a direct or indirect financial interest in a contract made by a state agency. This section is intended to prevent state employees from using their positions to obtain contractual benefits from the state and to avoid any public perception that state employees have an "inside track" on such opportunities.<sup>1</sup>

In Section 7, the term "contract" refers not only to a formal, written document setting forth the terms of two or more parties' agreement, but also has a much more general sense. Basically, any type of agreement or arrangement between two or more parties under which each undertakes

2. CONLEY V. TOWN OF IPSWICH, 352 Mass. 201, 224 N.E.2d 411 (1967) (G.L. c. 268A, §20) (transaction consisting of reimbursement of vendor by welfare agency for services to welfare recipients constitutes a "contract").
3. EC-COI-79-102 (business products); 79-99 (land).
4. EC-COI-81-64 (research grant from a state agency).
5. EC-COI-80-118 (non-profit corporation).
6. EC-COI-81-84 (consulting contract with a state board).
7. Compare EC-COI-79-70 (consulting contract with a private organization funded by the state); see also, Ethics Commission Compliance Letter 81-21, July 29, 1981 (cites various Department of Mental Health practices in violation of §7).
8. Compare EC-COI-80-116 (consulting contract for after-hours work by a state employee for another state agency); see also, Ethics Commission Compliance Letter 81-21; July 29, 1981.
9. A.G. Conflict Op. 799; EC-COI-79-77 (wife's financial interest in stenotypist contract with state agency is not imputed to the husband who is a state employee).
10. EC-COI-80-25 (where contract was for lease of space to operate store, husband/state employee is prohibited from participating in the operation of the store).

certain obligations in consideration of the promises made by the other(s) constitutes a contract.<sup>2</sup> The word thus includes employment arrangements, contracts for the sale of goods,<sup>3</sup> contracts to provide services, grants awarded by the state to individuals<sup>4</sup> or corporations,<sup>5</sup> contracts between a state agency and local agencies, construction contracts, consulting contracts,<sup>6</sup> etc. However, Section 7 only comes into play when a state employee enters into a second contract with a state agency. The employee's original employment arrangement with the state agency he or she works for is not within the scope of this section. Without that original contract or employment arrangement, the individual would not be a state employee.

Example: A full-time employee of the Rate Setting Commission owns 25 percent of the stock in a corporation which performs snow removal services. The employee will violate Section 7 if his corporation enters into a contract with the Massachusetts Turnpike Authority to remove snow from the Turnpike.

Example: A full-time employee of the state court system owns a roofing company. He cannot contract with the state to repair the roof of a state building.

Example: A full-time employee of the Division of Hearings Officer (DHO) works on her own time for a stenographic service company. One of the company's contracts is with the Massachusetts Parole Board for recording and transcribing testimony at Board hearings. While the DHO employee could work for the company, she would be prohibited under Section 7 from working on the Parole Board contract if she would be paid for her work out of contract funds.<sup>7</sup>

Example: A full-time Department of Corrections employee may not enter into a contract under which she is paid by the Department of Revenue to produce computer programs on weekends.<sup>8</sup>

## 2. Application to Spouses

The fact that a spouse of a state employee has a financial interest in a state contract does not automatically place the state employee in violation of Section 7 since the spouse's financial interest is not necessarily attributed to the state employee.<sup>9</sup> However, a state employee will not avoid the Section 7 prohibition merely by having the contract "technically" in a spouse's name.<sup>10</sup>

11. EC-COI-80-25; 80-39.
12. EC-COI-81-87 (state employee's ownership interest was 3/10 of 1% of stock of bank in which a state agency was depositing funds).
13. Specific examples of educational institutions:
  - program conducted in state facility by a private organization under state contract EC-COI-81-24
  - community college EC-COI-81-85
  - training program conducted by a state employee EC-COI-81-95
  - educational program within a correctional institution EC-COI-81-115

Example: An employee of the Commission for the Blind is married to an architect who contracts through her architectural firm to perform work for the Bureau of Building Construction. The architect herself has a financial interest in this contract, since she is a 40 percent owner of the architectural firm. However, the employee does not have an indirect financial interest in his wife's consulting contract simply because they are married. If the Commission employee were a partner or part-owner in his wife's architectural firm he would have a prohibited financial interest in the contract.

Example: An employee of the MBTA wants to lease property from the MBTA for a concession stand. He cannot have his wife sign the lease but then oversee operation of the stand himself.<sup>11</sup>

### 3. Exceptions

There are a number of limited exceptions to the application of Section 7:

- a) Section 7 does not apply if the financial interest involved consists of the ownership of less than 1% of the stock of a corporation.<sup>12</sup>

Example: Although the Xerox Corporation has contracts with the state, state employees who own shares in Xerox will not be deemed to have a financial interest in those contracts unless they own more than 1% of the outstanding shares of that company.

- b) A state employee in addition to his regular state job, may teach part-time in a state educational institution provided he does not participate in, or have official responsibility for, the financial management of the school.<sup>13</sup>

Example: An employee of the Department of Public Utilities may teach a course at night at Bunker Hill Community College.

14. EC-COI-81-97 (state employees' financial interest in a project to be funded by a loan from the Mass. Housing Finance Agency was less than 10%).
15. EC-COI-81-64 (associate professor at a State College qualified to be a special state employee and could have a financial interest in a research grant from a state agency).
16. EC-COI-81-106 (special state employee who does participate in activities of the state agency with which he desires to contract must seek Executive Council exemption).

- c) A state employee may have an interest in a competitively bid state contract if he or she is not responsible for the activities of the contracting agency, and the employee's financial interests (and those of immediate family members) are not in the aggregate greater than ten percent of the ownership interest in the contracting entity. Members of the General Court also qualify for this exception, but must file with the State Ethics Commission a statement disclosing their financial interest and that of their immediate family in any state contract.<sup>14</sup>
- d) A special state employee may enter into a contract with a state agency if he or she does not participate in or have official responsibility for the activities of the contracting agency and also files with the State Ethics Commission a statement disclosing his or her interests and those of immediate family members in the contract.<sup>15</sup> A special state employee may also enter into a contract with his or her own state agency if the employee files a disclosure statement describing his or her financial interests and those of immediate family members in the contract, provided that the Governor with the advice and consent of the Executive Council exempts the employee from the prohibitions of Section 7.<sup>16</sup>

Example: A member of the Outdoor Advertising Board is not paid for her services on the Board and does not work on a full-time basis. She is, therefore, a special state employee. She is asked by the Department of Social Services (DSS) to perform consulting work for compensation. Since the Board member does not participate in or have official responsibility for the activities of DSS, she may enter into the consulting contract if she files a statement with the State Ethics Commission disclosing her financial interest and that of her immediate family in the contract.

17. EC-COI-81-43 (exemption only applies to rates set by the Department of Public Welfare and not the Rate Setting Commission); 81-130 (a full-time state employee may be compensated by public assistance payments for treating clients if the rates on which the compensation is based are set by the Department of Public Welfare).

G. PUBLIC BUILDING AND CONSTRUCTION CONTRACTS (Section 8)

1. A.G. Conflict Op. 752 (state legislator who is also agent in writing insurance policies for a private construction company may not require a bidder on a public construction contract to obtain insurance required by the contract from any particular insurance or surety company, agent or broker).

H. PROHIBITED APPOINTMENTS OF BOARD AND COMMISSION MEMBERS (Section 8A)

1. EC-COI-80-8 (former member of a state board may accept a consulting position with the board since the consulting contract would begin more than thirty days from the expiration of her term of office); 81-101 (former chairman of a state board may be compensated as hearing officer for the board because more than thirty days have passed since he left the board); STARR V. BOARD OF HEALTH OF CLINTON, 356 Mass. 426, 252 N.E.2d 893 (1969) (G.L. c. 268A, §21A).

- e) A final exception applies to a state employee providing services, goods and supplies to the recipient of public assistance, if the payments are made according to rates promulgated by the Department of Public Welfare and the recipient has the right to and does choose the person providing such services or supplies.<sup>17</sup>

IF YOU LEARN THAT YOU HAVE A FINANCIAL INTEREST IN A CONTRACT MADE BY A STATE AGENCY, YOU MUST WITHIN 30 DAYS FULLY DISCLOSE YOUR FINANCIAL INTEREST TO THE AGENCY INVOLVED AND TERMINATE OR DISPOSE OF YOUR INTEREST.

G. PUBLIC BUILDING AND CONSTRUCTION CONTRACTS (Section 8)

Section 8 forbids any state, county or municipal employee or anyone acting on an employee's behalf from requiring a bidder on a public construction contract to purchase the necessary surety bonds or insurance from a specified insurance or surety company, agent or broker.<sup>1</sup>

H. PROHIBITED APPOINTMENTS OF BOARD AND COMMISSION MEMBERS  
(Section 8A)

Section 8A of the conflict law prohibits the members of a state board or commission from appointing one of its members to any office or position falling under the supervision of that board or commission. This prohibition lasts for thirty days from the member's termination of service on the board or commission. The section is another example of the law's intent to preclude public employees from taking advantage of their employment with the state to advance their private interests.

Section 8A must be read in conjunction with Section 6 of Chapter 268A. Under Section 6, a member of a board or commission would be prohibited from substantially participating in any discussion or plans to be appointed by the board to an office or position under the board's supervision, if that new office or position would involve compensation, since the board member's financial interests would thereby be affected. Thus, even if a board member resigns from the board and waits more than thirty days to assume a position, if the member substantially participated in discussions concerning his appointment to that position while still on the board, he would violate the conflict-of-interest law.<sup>1</sup>

2. EC-COI-80-44 (member of a Board of Registration to be appointed an investigator under the Board).

I. PROHIBITED APPOINTMENTS OF TRUSTEES OF PUBLIC INSTITUTIONS OF HIGHER LEARNING (Section 23A)

1. EC-COI-80-21 (community college faculty member may not be a member of a Board of Trustees which governs his community college).

J. STANDARDS OF CONDUCT

Example: A member of the Board of Registration of Sanitarians may not resign from the Board, wait thirty days, and then be appointed by the Board as its paid Executive Secretary, if the member initiated or otherwise participated in discussions with the other Board members concerning such an appointment while serving on the Board.<sup>2</sup>

I. PROHIBITED APPOINTMENTS OF TRUSTEES OF PUBLIC INSTITUTIONS OF HIGHER LEARNING (Section 23A)

Section 23A of the conflict statute prohibits appointment of a trustee of any public institution of higher learning operated by the Commonwealth to any office or position with that institution for three years after the trustee's term of service.<sup>1</sup> An elected student trustee is barred from accepting such an appointment for a year following his or her term, but may accept part-time employment at the institution while still a student.

J. STANDARDS OF CONDUCT (Section 23)

Section 23 of Chapter 268A sets forth six additional prohibitions applicable to all public employees. These provisions are collectively referred to as the "Standards of Conduct." Since they articulate some of the most fundamental principles and prohibitions applicable to public employment, the Standards serve essentially as a general code of ethics which supports and supplements the other provisions of the conflict-of-interest law. The Standards extend beyond single actions which constitute conflicts and address both courses of conduct raising conflict questions and appearances of conflicts. The Standards do not provide for criminal penalties, but rather are to be interpreted and enforced by the State Ethics Commission and by constitutional officers and agency heads through appropriate civil and administrative action.

The Standards and the appropriate enforcement methods offer agency heads an opportunity to develop realistic and effective guidelines which are tailored to specific conflict situations unique to a particular agency's operations and which can address particular recurring situations or matters of concern.

1. EC-COI-81-107 (state employee with authority to grant certain licenses may not be employed by a private party to testify in legal proceedings on the quality of a licensee's work).
2. EC-COI-80-26 (investigator for a state agency who owns and operates a private detective agency); 81-73 (city solicitor prohibited from representing private clients in criminal cases against the same city because of access to confidential information and duty to disclose in interest of client).
3. EC-COI-80-26 (see n. 2 above).
4. EC-COI-81-88 (private non-profit corporation using State House office space, telephone and supplies of legislator who is a member of the corporation's board of directors); 80-115 (state employee on a city council must avoid using either position to the benefit of himself or the other employer).
5. EC-COI-81-43 (DMH employee receiving private compensation for evaluating clients referred by state agencies or whose expenses are paid by a state agency); 81-134 (a state employee may not receive an expense paid trip in return for soliciting, organizing and leading a group comprised of persons under her regulatory authority on that trip); 80-28 (state employee may accept honoraria for speaking engagements if certain guidelines are followed).
6. EC-COI-81-76 (state employee starting a business may not hire an agent to solicit business from his state agency because of his "insider" status); 81-55 (state inspector may not do private work repairing machinery subject to inspection by fellow employees within his state agency).
7. EC-COI-81-87 (bank president may not serve on the board of trustees of a state institution while the institution invests large sums of money in his bank); 81-76 (see n. 6 above).

The specific provisions of Section 23 state that no officer or employee of a state, county or municipal agency shall:

- a) accept other employment which will impair his independence of judgment in the exercise of his official duties;<sup>1</sup>
- b) accept employment or engage in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority;<sup>2</sup>
- c) improperly disclose confidential information acquired by him in the course of his official duties nor use such information to further his personal interests;<sup>3</sup>
- d) use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others;<sup>4</sup>
- e) by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is unduly affected by the kinship, rank, position or influence of any party or person;<sup>5</sup>
- f) pursue a course of conduct which will raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.<sup>6</sup>

As is the case with each provision of the conflict-of-interest law, application of the Standards of Conduct to a specific situation depends on the facts of that situation. Since these Standards supplement the other provisions of the law, conduct may violate Section 23 even though it is not specifically prohibited by any other provision of the statute. In other words, private employment or "second jobs" which do not violate Sections 4 or 7 may violate Sections 23(a), 23(b), 23(c), or 23(f); official actions which do not violate Sections 2, 3 or 6 may violate Sections 23(d), 23(e), or 23(f).<sup>7</sup>

As a general rule, the Standards of Conduct may apply whenever there is an overlap or direct connection between a public employee's official duties and responsibilities -- or



those of his or her agency -- and his or her private activities, interests or relationships. Since this overlap of personal and public interests can at a minimum create an "appearance of impropriety," Section 23 may prohibit a particular employee or group of employees from engaging in a particular activity. Thus, these sections may prohibit a state employee from working "on the side" for a company which does business with, gets funds from, or is regulated by, the state agency by which he is employed. These sections may also prohibit a state employee from acting in his official capacity in matters affecting persons or entities with which he has a business or personal relationship.

The following examples are offered to highlight types of conduct which could violate the Standards so that you may be aware of the scope of their prohibitions.

Example: An employee of the Bureau of Building Construction (BBC) enters into a consulting contract with a construction company which regularly seeks to obtain contracts with BBC. Under the terms of the consulting contract the employee will provide engineering services on out-of-state construction projects. This outside employment would probably not violate Section 4(a) of Chapter 268A since the compensation would not be received in relation to state contracts. Moreover, if his duties as a BBC employee do not require him to participate in awarding or monitoring BBC contracts with this company, Section 6 would probably not apply. However, the Director of the BBC in a Code of Conduct has determined that acceptance of such employment would violate Section 23 since outside employment of his type implicates both the Section 23(a) prohibition against acceptance of employment which will impair the public employee's independence of judgment in the exercise of official duties and the Section 23(e) proscription against giving the appearance that any person can unduly enjoy a public employee's favor in the performance of official duties.

Example: A corporate tax examiner in the Department of Revenue sets up her own corporate finance consulting business and uses confidential information from the tax returns which she inspects in her official capacity to prepare a client list for use in her private business. This would undoubtedly violate the prohibition of Section 23(c) against using confidential information acquired in the course of official duties to further personal interests. Moreover, if the consulting business rendered advice and

8. IN THE MATTER OF BERNARD J. SMITH, Comm. Disposition  
Agreement, Sept. 23, 1980.
  
9. IN THE MATTER OF FREDERICK HANNA, Comm. Disposition  
Agreement, Feb. 13, 1980.

assistance concerning the Department of Revenue's interpretations of the tax laws and their confidential enforcement policies, the nature of this business would implicate Sections 23(b) and 23(c) which prohibit disclosure of confidential information. Furthermore, if she were to audit returns filed by companies which were clients of her business, she may violate Sections 23(d), 23(e) and 23(f) as well as Section 6 because she could actually favor her private employees or appear to do so.

Example: A state employee submits a request for reimbursement for travel expenses purportedly incurred in attending a conference. The member did, in fact, attend the conference, but did not incur the full expenses for which he seeks reimbursement. This conduct would undoubtedly violate, in addition to other laws of the Commonwealth, Section 23(d), since it constitutes an attempt to use an official position to secure unwarranted privileges.<sup>8</sup>

Example: A state seafood inspector engages in a private business which produces seafood and markets it to Massachusetts seafood businesses which she is responsible for inspecting. This conduct clearly violates Section 23(e) since it gives reasonable basis for a public impression that the seafood businesses which purchase products from the inspector's private business can improperly influence the inspector or unduly enjoy her favor in the performance of her official duties.<sup>9</sup>

Example: An appointed member of a state regulatory board solicits political contributions in connection with his campaign for local office from businesses subject to the board's regulation. He thereby violates Sections 23(e) and 23(f) because his conduct creates the impression that businesses which contribute can improperly influence him in the performance of his official duties and that he is likely to be engaged in acts that are in violation of his trust. This is true whether or not the solicited businesses have matters pending before the board at the time of the solicitations.

Example: A planning board member who participates in the board's consideration of a subdivision plan submitted by a contractor who at the same time is

10. IN THE MATTER OF KENNETH J. MASSE, Comm. Disposition  
Agreement, Sept. 17, 1980.
11. EC-COI-80-20.
12. EC-COI-80-51.

building his house violates Sections 23(e) and 23(f) since his actions create a reasonable basis for the impression that the contractor can unduly enjoy his favor in the performance of his official duties and raise suspicion among the public that he is likely to be engaged in acts in violation of his trust.

Example: A nursing home inspector for the state violates Sections 23(a), 23(e) and 23(f) by working during his off-duty hours for the nursing homes which he is responsible for inspecting due to the direct connection between his state work and his private employment.<sup>10</sup>

Example: A state employee responsible for analyzing and making recommendations on the awarding of contracts is offered a job by a company which is currently seeking a contract. If the employee enters into negotiations or makes any arrangements concerning prospective employment, Section 6 will apply. However, even if not pursued, this offer must be disclosed to the employee's superiors, since by failing to make the disclosure and continuing to participate in the contract process, the employee would create the impression that the private party could improperly influence his official actions in violation of Section 23(e).<sup>11</sup>

Finally, you should note that several state agencies have promulgated their own Codes of Conduct under Section 23. These Codes identify the types of activities which, in the judgment of the head of the agency, constitute inappropriate conduct on the part of agency employees (for example, the receipt of gifts and entertainment by employees from businesses which have dealings with their agency). Accordingly, you should check to see whether your agency has such a Code. While the State Ethics Commission will render advisory opinions on the application of Section 23 to specific situations, the Commission generally will not respond to requests for opinions which challenge guidelines or other administrative action taken by agency heads pursuant to this Section.<sup>12</sup>



## APPENDIX A

### HOW TO REQUEST A CONFLICT-OF-INTEREST OPINION

The following general procedures apply when a state employee requests an opinion from the State Ethics Commission:

- \* Requests for opinions must be in writing.
- \* The request must present a problem under Chapter 268A. Various other statutes regulate the conduct of public officials and employees. While those statutes may affect the advice given in an opinion, the Commission is not authorized to render opinions concerning their requirements.
- \* Only a person who is, or may be, subject to the provisions of Chapter 268A is entitled to receive an advisory opinion. The Commission will not respond to an inquiry from an individual concerning someone else's potential conflict. The Commission will, however, respond to the request of an authorized representative, such as an attorney.
- \* An opinion will not be rendered on a hypothetical case. Specific facts -- and all the relevant facts -- of an actual situation must be presented.
- \* The Commission generally will not respond to requests for opinions which challenge administrative action by agency heads in relation to Section 23 of Chapter 268A. Section 23 establishes Standards of Conduct for all government employees, which may be enforced through appropriate administrative action by agency heads. The Commission, also, will not issue an opinion reviewing an activity which is clearly prohibited by the Standards or Guidelines promulgated by an agency for the conduct of its employees.
- \* The Commission may decline to render an opinion where the activity in question is the subject of adjudication before it or litigation in the courts, may be affected by pending legislation, or is under investigation by the Commission or some other law enforcement agency.

# # #

State Ethics Commission  
One Ashburton Place - Room 1413  
Boston, Massachusetts 02108  
(617) 727-0060

## APPENDIX B

### HOW TO FILE A COMPLAINT

The State Ethics Commission may initiate a confidential inquiry into any alleged conflict of interest about which it has sufficient evidence. If you have reason to believe that a violation of the conflict-of-interest law has occurred or is occurring, you may call or visit the State Ethics Commission office and speak with a member of the Commission's staff. If after discussing the matter with the Commission's representative, you wish to make out a sworn complaint, a form will be provided you for that purpose. Referrals need not, however, be in the form of a sworn complaint.

# # #

State Ethics Commission  
One Ashburton Place, Room 1413  
Boston, Massachusetts 02108  
(617) 727-0060

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